Pacific Asia Leasing (M) Sdn Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil Ikram, Third Party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C-23-1587-86
SHANKAR J
22 JUNE 1992

Civil Procedure *— Pleadings — Striking out third party statement of claim — Contribution sought by defendant from third party — Whether reasonable cause of action disclosed — Whether cause of action must have accrued at time third party notice taken out — Crystallization of potential cause of action — Rules of the High Court 1980 O 16 r 1(1)(a), (c) & O 18 r 19*

Civil Procedure *— Third party proceedings — Third party notice — Grounds of claim stated in notice — Such grounds not be described as statement of claim*

Civil Procedure *— Third party proceedings — Third party summons for directions — Consent order made on summons — Effect thereof — Third party acquiesced in validity of third party notice*

The second defendant and the third party had both given a guarantee and indemnity to the plaintiff in respect of an equipment lease agreement entered into between the plaintiff and the first defendant. The plaintiff alleged that the first defendant had acted in default of the agreement and brought an action against the first and second defendants for, inter alia, the total amount of the unpaid rentals. The second defendant brought third party proceedings against the third party seeking a contribution from the third party in the event that the second defendant was found liable to make any payment to the plaintiff. The third party entered an appearance on 30 April 1987 and on 7 May 1987, relying on O 16 r 4(2) of the Rules of the High Court 1980 ('RHC'), applied for an order to set aside the third party notice and a purported statement of claim filed by the second defendant against the third party. On 8 May 1987, the second defendant filed a summons for directions on the third party notice in respect of which a consent order was made.

The third party sought for the 'statement of claim' to be struck out on the grounds set out in O 18 r 19(1) of the RHC, the chief of which was that it disclosed no reasonable cause of action. It was contended for the third party that a surety is not entitled to commence third party proceedings against his co-surety until he has first paid more than his portion of the debt due to the creditor.

Held, dismissing the application:

(1) Order 16 r 4(2) of the RHC permits a third party who has been served with a third party notice to make an application to set it aside if, seven days after he had entered an appearance, the

defendant has failed to take out a third party summons for directions. The third party's application in the instant case was premature as it had been filed before the seven-day period had expired.

(2) The document described as a statement of claim was not such but was in fact a third party notice. The rules require the use of Form 22 which requires the defendant to state the grounds of the claim. The third party's solicitors' description of the grounds in the third party notice as a 'statement of claim' was a misnomer.

(3) By consenting to the order on the summons for directions, the third party's solicitors had acquiesced in the validity of the third party notice.

(4) The terms of O 16 r 1(1)(a) of the RHC apply to a defendant who 'claims ... any contribution'. Those words do not import a precondition that the defendant must establish that his cause of action for a contribution should already have accrued at the time he takes out his third party notice. The second defendant was claiming a contribution in the event that the court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallized at that point and the mutual obligations of the parties should be resolved immediately at that stage. The surety is entitled to enforce his potential right to contribution even before he has paid anything.

[Bahasa Malaysia summary

Defendan kedua dan pihak ketiga telah kedua-duanya memberi suatu jaminan dan tanggung rugi kepada plaintif berkenaan dengan suatu perjanjian pajakan kelengkapan yang telah diikat oleh plaintif dengan defendan pertama. Plaintif mengatakan bahawa defendan pertama telah bertindak mengingkari perjanjian itu dan membawa suatu tindakan terhadap defendan pertama dan kedua untuk, antara lain, jumlah amaun bagi sewa yang tidak dibayar. Defendan kedua membawa prosiding pihak ketiga terhadap pihak ketiga meminta suatu sumbangan daripada pihak ketiga sekiranya defendan kedua didapati bertanggungjawab untuk membuat sebarang pembayaran kepada plaintif. Pihak ketiga telah memasukkan kehadiran pada 30 April 1987 dan pada 7 Mei 1987, bergantung pada A 16 k 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), telah memohon suatu perintah untuk mengetepikan notis pihak ketiga dan sesuatu yang dikatakan pernyataan tuntutan yang telah difailkan oleh defendan kedua terhadap pihak ketiga. Pada 8 Mei 1987, defendan kedua memfailkan suatu saman untuk arahan atas notis pihak ketiga itu berkenaan dengan mana suatu perintah persetujuan telah dibuat. Pihak ketiga telah memohon untuk 'pernyataan tuntutan' itu dibatalkan atas alasan yang dinyatakan dalam A 18 k 19(1) KMT, yang paling utama adalah bahawa ia tidak mendedahkan apa-apa kausa tindakan yang munasabah. Telah dihujahkan bagi pihak ketiga bahawa seorang penjamin tidak berhak memulakan prosiding pihak ketiga terhadap penjamin bersamanya sehingga

dia membayar dahulu lebih daripada bahagiannya bagi hutang yang kena dibayar kepada pemiutang. A

Diputuskan, menolak permohonan itu:

(1) Aturan 16 k 4(2) KMT mengizinkan suatu pihak ketiga yang telah disampaikan dengan suatu notis pihak ketiga untuk membuat suatu permohonan untuk mengetepikannya jika, tujuh hari selepas dia telah memasukkan kehadiran, defendan gagal mengeluarkan suatu saman pihak ketiga untuk arahan. Permohonan pihak ketiga dalam kes ini adalah terlalu awal kerana ia telah difailkan sebelum masa tujuh hari itu tamat tempohnya. B

(2) Dokumen yang digambarkan sebagai pernyataan tuntutan itu bukanlah begitu tetapi sebenarnya adalah suatu notis pihak ketiga. Kaedah-kaedah itu mengkehendaki penggunaan Borang 22 yang mengkehendaki defendan untuk menyatakan alasan tuntutan itu. Penggambaran peguamcara pihak ketiga akan alasan dalam notis pihak ketiga itu sebagai suatu 'pernyataan tuntutan' adalah suatu nama yang tidak kena. C D

(3) Dengan menyetujui perintah atas saman untuk arahan itu, peguamcara pihak ketiga telah bersetuju dengan keesahan notis pihak ketiga itu.

(4) Terma A 16 k 1(1)(a) KMT terpakai kepada seseorang defendan yang 'menuntut ... sebarang sumbangan'. Perkataan-perkataan itu tidak bermaksud adalah suatu prasyarat yang defendan mesti membuktikan bahawa kausa tindakannya untuk suatu sumbangan harus sudah terakru pada masa dia mengeluarkan notis pihak ketiga. Defendan kedua menuntut suatu sumbangan sekiranya mahkamah mendapat dia bertanggungjawab membuat sebarang pembayaran kepada plaintif. Kausa tindakan berpotensi yang ada padanya terhadap pihak ketiga itu pasti terbentuk pada ketika itu dan obligasi bersama kedua pihak itu seharusnya diselesaikan serta-merta pada peringkat itu. Si penjamin berhak menguatkuasakan hak berpotensinya untuk sumbangan sebelum dia mebayar apa-apa pun.] E F G

Cases referred to

1 *Bank Bumiputra Malaysia Bhd v Darnaz Enterprise Sdn Bhd & Ors* [1986] 2 MLJ 222 (not folld)

2 *Re Snowdon, ex p Snowdon* (1881) 17 Ch D 44 (refd)

3 *Wolmershausen v Gullick* [1893] 2 Ch 514 (refd) H

Legislation referred to

Rules of the High Court 1980 O 16 rr 1(1)(a), (c), 4(2)

Vykneswary (*AJ Ariffin Chong & Harpal*) for the plaintiff.
Jagjit Singh Gill (*Gill & Co*) for the second defendant. I
Abdul Ghani (*Abdul Ghani & Co*) for the third party.

Cur Adv Vult

Shankar J: This is an application to set aside a third party notice and to strike out a purported statement of claim filed by the second defendant against the third party.

The plaintiff ('Pacific') entered into an equipment lease agreement ('the said agreement') with the first defendant ('Senanti') in respect of a bulldozer. At the time the second defendant was a director of Senanti. So was the third party. Both of them signed a guarantee and indemnity annexed to the said agreement for its due performance. The third party was also a director of Pacific at all material times.

Pacific alleges that Senanti defaulted on its obligations. So Pacific terminated the said agreement, repossessed and sold the bulldozer, and brought this action, inter alia, for the total amount of the unpaid rentals for the entire duration of the said agreement. Summary judgment was given in the first instance by the senior assistant registrar. The defendants appealed. I set aside that judgment and gave unconditional leave to defend. My reasons are already set out in a previous judgment.

The second defendant issued a third party notice after service of the writ of summons and the statement of claim.

Order 16 r 4(2) of the Rules of the High Court 1980 ('RHC') permits a third party who has been served with a third party notice to make an application to set it aside if, seven days *after* he has entered an appearance, the defendant has failed to take out a third party summons for directions. Appearance was entered on 30 April 1987. The application to set aside was filed on 7 May 1987, before seven clear days had expired. So it was premature. On 8 May 1987, the summons for directions was taken out. On 3 July 1987, a consent order was made by the senior assistant registrar on this summons that the second defendant serve his statement of claim on the third party within 14 days but the third party do file his defence, 'within 14 days from the date the court decides the summons-in-chambers filed on 7 May 1987 to set aside the third party notice'.

The summons-in-chambers had two prayers. The first was pursuant to O 16 r 4(2) of the RHC. The second prayer was to strike out a 'statement of claim' dated 24 April 1987 on the grounds set out in O 18 r 19(1) of the RHC, the chief of which is that it disclosed no reasonable cause of action.

Having had the benefit of further arguments, I would observe as follows. The document dated 24 April 1987 was not a statement of claim. It was in fact the third party notice. The rules require the use of Form 22 which requires the defendant to state *the grounds of the claim*. The third party's solicitors' description of the grounds in the notice as a 'statement of claim' is a misnomer.

By consenting to the order on the summons for direction, the third party's solicitors acquiesced in the validity of the third party notice. A formal statement of claim was delivered on 11 July 1987 pursuant to the order for directions.

But to put an end to any further doubts as to the merits, I propose to treat the third party's objections under O 18 r 19 as being related to this statement of claim which is in very similar terms to the grounds referred to earlier.

In the third party's affidavit (encl 21), he admits he is a co-guarantor; but he says it is Pacific's prerogative to sue a guarantor of its choice. In para 3 of his affidavit he avers that for the purpose of these proceedings he could not be made liable under the guarantee. The only reason given is that in law the second defendant is not entitled to make him, a third party, as an indemnifier or contributor for the reason that the right to contribution 'will only arise after the second defendant has first fully settled all outstanding debts due to the plaintiff which he has not done so, to my knowledge'.

The case upon which his solicitors rely is *Bank Bumiputra Malaysia Bhd v Darnaz Enterprise Sdn Bhd & Ors*[1] where the following passage appears at p 224:

> The second third party's co-sureties, that is, the second to the fifth defendants, also do not have a cause of action against him because they have not each paid anything to the creditor. A surety is not entitled to call upon his co-surety for contribution until he has paid more than his portion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor (*Re Snowdon, ex p Snowdon* (1881) 17 Ch D 44).

The suggestion is that a surety is therefore not entitled to commence third party proceedings against his co-surety until he has first paid more than his portion of the debt due to the principal creditor. With respect I am unable to agree.

The terms of O 16 r 1(1)(a) of the RHC in so many words apply to a defendant who 'claims ... any contribution'. I do not read these words as importing a precondition that the defendant must establish that his cause of action for a contribution should already have accrued at the time he takes out his third party notice. The second defendant here was claiming a contribution in the event that the court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallized at that point and the mutual obligations of the parties should be resolved immediately at that stage.

To put it another way, the surety in my view is entitled to enforce his potential right to contribution even before he has paid anything. He can obtain a prospective order directing the co-surety on payment of his own share to indemnify him against any further liability and since Pacific, the principal creditor, is a party to these proceedings, the second defendant can even apply for an order directing the third party to pay his share directly to the plaintiff. Authority for these statements can be found in *Chitty on Contracts* (25th Ed) (Specific Contracts) at para 4462.

As to a surety's right to an indemnity against a principal debtor, there is a specific reference to third party procedure in para 4455. The procedural implications are the same. *Ex parte Snowdon*[2] is not referred to in *The Supreme Court Practice* (1979) under O 16. Had *Wolmershausen v Gullick*[3] been brought to the attention of the High Court in the case just referred to, the decision may well have been different.

Furthermore the provisions of O 16 r 1(1)(c) of the RHC are very wide. I agree with counsel for the second defendant that the passages he cited

from 20 *Halsbury's Laws of England* (4th Ed) para 315, and 37 *Atkins Court Forms* (2nd Ed) (1981 issue) at pp 299 and 302 are very relevant.

In all the circumstances, I dismiss the third party's application (encl 22) with costs to be taxed and paid by the third party to the second defendant. I further direct that he do file his defence to the second defendant's statement of claim within 14 days from today as previously ordered by consent.

Application dismissed.

Reported by PS Ranjan